tive as being contrary to public policy. Condition 12 must be read in the same light.

The purchasers are therefore entitled to possession as the occupants are in unlawful possession of the disputed property, ie they are trespassers or, at most, bare licensees and, on the evidence, had been given ample notice before action. Furthermore, service of the summons-in-chambers herein was itself a notice of termination of the license. (See *Tool Metal Manufacturing Co* v *Tungsten Electric Co.*[3]) Indeed, prior to the issue of the summons-in-chambers, the occupants have had notice when the purchasers' former solicitors served them with a notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from date of receipt thereof, which is more than sufficient notice to a bare licensee.

The defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since there can be no estoppel against a statute; specifically, the various provisions of the Code to which I have referred. So, for example, there can be no estoppel from questioning the validity of a document which is required by law to be registered and is not registered. (See *Mst Kauleshwari Kuer* v *Surajnath Rai.*[4])

Accordingly, I discharged the interlocutory injunction dated 29 May 1990 made in favour of the occupants and granted the declaration for vacant possession prayed for by the purchasers. Upon the purchasers going into possession of the disputed property the occupants were to be restrained from interfering with the purchasers' peaceful possession thereof. Damages were to be assessed and paid by the occupants upon enquiry by the senior assistant registrar and the purchasers were to have the costs of the proceedings.

Subsequently, after extraction of my order aforesaid, counsel appeared before me, and after hearing argument, I had, in the exercise of my powers under the slip rule, varied the declaratory order aforesaid, so as to require the occupants to deliver vacant possession forthwith to the purchasers. Apart from the slip rule, the court has an inherent power to vary its own orders so as to bring it into harmony with the order which it obviously meant to pronounce (per Lord Watson in *Hatton* v *Harris*[5] at p 560). A mere declaratory order would not have conveyed the intention of the court.

Lastly, for the avoidance of doubt, I ordered that such damages as are found by the senior assistant registrar to be payable by the occupants shall be paid to the purchasers.

Application allowed.

Solicitors: *Annamalai & Co; VM Mohan & Co.*

Reported by *PS Ranjan*

Public Prosecutor v Lee Chee Meng & Anor

HIGH COURT (JOHORE BAHRU) — CRIMINAL TRIAL NO 58-14-87
JAMES FOONG JC
13 AUGUST 1990

Criminal Law — Dangerous drugs — Trafficking — Care and custody of things in room where drugs were found — Exclusive right to use of room — Drugs concealed — Dangerous Drugs Act 1952, ss 37(b), (g), 39B(1)(a) & (2)

Criminal Law — Common intention — Pre-arranged plan — Prior meeting of minds — Penal Code (FMS Cap 6), s 34

Criminal Law — Cautioned statement — Admissibility — Statement not made voluntarily

The two accused were charged with trafficking 23.71g of heroin mixed with monoacetyl morphine under s 39B(1)(a) of the Dangerous Drugs Act 1952. The second accused was the girlfriend of the first accused and they were both charged with common intention to commit a crime under s 34 of the Penal Code. The first accused contended that he had no exclusive right to his room.

Held, finding the first accused guilty and acquitting the second accused:

(1) The first accused's cautioned statement was inadmissible as it was not made voluntarily. He was subjected to threats and beatings; the police had not observed the Lock-Up Rules; the cautioned statement does not contain any statement in the form and answer manner that the first accused understood the caution administered to him; and two different meanings could be referred to in the caution.

(2) Two elements must be proved in common intention — the accused was either committing the crime or at the scene of the crime and there must be evidence of a common intention. There must be a prior meeting of the minds and presupposes some prior concert.

(3) There was no evidence to infer that the first accused and second accused had a prior meeting of the minds to commit the said crime. The second accused was a girlfriend of the accused; there were no exhibits besides a blue shirt found in the room that were proved to belong to the second accused and she was not the occupier or had care and control of the room. Under these circumstances the second accused was acquitted without being called upon to make her defence.

(4) The first accused was a sub-tenant to the room of the premises. He had the care and management of the said room and is presumed to be an occupier of the room under s 37(b).

(5) The drugs were also concealed; they were kept in a shoe box and in a rotan case. Section 37(g) of the Act therefore applies.

(6) The court could not accept as probable that the first accused never locked his room when he went out. 'Exclusive right' must be viewed in the light of all circumstances of each particular case. Evidence that some of the accused's friends entered the room with or without his permission is not sufficient evidence that the drugs found did not belong to the accused and that he had lost his exclusive use of the room.

[Bahasa Malaysia summary

Dua orang tertuduh telah dituduh atas tuduhan mengedar 23.71g heroin yang dicampur dengan monacetyl morphine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Tertuduh kedua adalah teman wanita tertuduh pertama dan kedua-dua mereka dituduh dengan niat bersama melakukan kesalahan di bawah s 34 Kanun Keseksaan. Tertuduh pertama mengatakan bahawa dia tidak ada hak eksklusif kepada biliknya.

Diputuskan, mendapati tertuduh pertama bersalah dan membebaskan tertuduh kedua:

(1) Kenyataan beramaran tertuduh pertama tidak boleh diterima kerana ia tidak dibuat secara sukarela. Dia telah dikenakan ancaman dan pukulan; polis tidak mematuhi Aturan Lokap; kenyataan beramaran tidak mengandungi sebarang kenyataan dalam bentuk soalan dan jawapan yang tertuduh pertama boleh faham amaran yang telah diberi kepadanya; dan dua makna berlainan boleh dirujuk kepada amaran itu.

(2) Dua unsur mesti dibuktikan dalam niat bersama tertuduh samada ketika itu sedang melakukan kesalahan jenayah ataupun berada di tempat jenayah dan mestilah wujudnya keterangan niat bersama. Mestilah terdapat pertemuan fikiran yang terdahulu dan membawa praandaian bahawa terdapat perancangan bersama terdahulu.

(3) Tidak ada keterangan yang memberi kesimpulan bahawa tertuduh pertama dan kedua ada pertemuan fikiran terdahulu untuk melakukan jenayah itu. Tertuduh kedua ialah seorang teman wanita tertuduh pertama; tidak terdapatnya eksibit melainkan suatu kemeja biru yang dibuktikan kepunyaan tertuduh kedua dan dia juga bukanlah penghuni atau memegang jagaan dan kawalan bilik itu. Di bawah keadaan ini, tertuduh kedua dibebaskan tanpa dipanggil membuat pembelaannya.

(4) Tertuduh pertama adalah penyewa kecil bilik dalam premis itu. Dia mempunyai jagaan dan pengurusan bilik itu dan dianggap sebagai penghuni bilik itu di bawah s 37(b).

(5) Dadah itu juga disembunyikan; mereka disimpan dalam kotak kasut dan bag rotan. Jadi 37(g) Akta terpakai.

(6) Mahkamah tidak boleh menerima kebarangkalian bahawa tertuduh pertama tidak langsung mengunci biliknya apabila dia keluar. 'Hak eksklusif' mestilah ditinjau dari segi semua keadaan dalam tiap-tiap kes tertentu. Keterangan bahawa beberapa kawan tertuduh pertama memasuki bilik dengan atau tanpa kebenarannya bukanlah keterangan mencukupi bahawa dadah yang dijumpai itu bukan kepunyaan tertuduh dan bahawa dia telah hilang kegunaan eksklusif bilik itu.]

Cases referred to

1 *Mahboob Shah* v *King Emperor* AIR 1945 PC 118 (folld)
2 *Namasiyiam & Ors* v *PP* [1987] 2 MLJ 336 (folld)
3 *PP* v *Aris bin Yunos* [1989] 1 CLJ 239 (refd)
4 *PP* v *Chong Wei Kian* [1990] 3 MLJ 165 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(b), (g), 39B(1)(a), (2)
Penal Code (FMS Cap 6) s 34

Hadariah bte Syed Ismail (Deputy Public Prosecutor) for the Public Prosecutor.

Teh Poh Teik for both accused.

Cur Adv Vult

James Foong JC: The first and second accused are jointly charged under an amended charge which reads as follows:

> Bahawa kamu bersama-sama pada 14 Mei 1986 lebih kurang jam 10.50 pagi, di tingkat dua rumah No 54-B, Jalan Perang, Taman Pelangi, Johore Bahru, di dalam daerah Johore Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya iaitu 23.71g campuran heroin dan monoacetyl morphine bagi pihak diri sendiri dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

The facts of this case are briefly as follows. On 14 May 1986 at or about 10.50am Inspector Jasbir Singh (PW 2) together with his men, namely, D/C Muda, D/C Wahid and D/C Asaari raided a room shown as room B in the sketch plan produced and marked by the court as P29. This room was situated at the rear portion of a flat in a three-storey shophouse known as 54-B, Jalan Perang, Taman Pelangi, Johore Bahru.

Inspector Jasbir Singh and his men gained entry to the flat from one person by the name of Loke Kow Chai whom they met at the ground floor of the said shophouse.

Upon entering the flat No 54-B, Jalan Perang, they proceeded straight to room B. After knocking on the door, a male Chinese identified as the first accused opened the door. Inspector Jasbir Singh and his police party noticed a female Chinese was also sleeping in this said room at the material time. This female Chinese was identified as the second accused.

Upon entering the room, Inspector Jasbir Singh found on top of the plastic cupboard a rotan case (P3) normally used as a vanity case by women. In this rotan case he found therein: (1) wrapped in newspaper ten plastic packets (P5) containing substance suspected of drugs, (2) four lipsticks, (3) one eye shadow box, (4) one tube of lip conditioner, (5) six card calenders, and (6) one small purse containing $3.25.

Upon a search of the room, D/C Asaari (PW3) found two black shoe boxes which were then immediately handed over to Inspector Jasbir Singh. Inspector Jasbir Singh found in one shoe box (P11) the following items: (1) one red plastic bag which had 26 small plastic packets (P13) wherein each of them contained substances suspected to be drugs, and (2) 25 plastic packets (P14) wherein each of them contained substances suspected to be drugs.

In the other shoe box (P15) the following items were found by Inspector Jasbir Singh: (1) four candles (P16), (2) one spoon (P17), (3) one foldable pen knife (P18), and (4) 117 empty plastic bags (P19).

From the plastic cupboard the police party recovered the following items: (1) one restricted passport (P26) in the name of first accused, (2) one bunch (P27)

of three keys, (3) one padlock lock with a key inserted in it (P28), (4) seven shirts (P21), (5) three T-shirts (P22), (6) one sweater (P23), (7) three trousers (P24), and (8) one blue shirt (P25).

The first and second accused were then arrested and brought back to the police station.

At the same time of the raid in room B, a raid in room A as indicated in the sketch plan (P29) was also carried out. In that room which was occupied by one Yoong Thien Soong (who was constantly produced and identified during the period of this trial), Inspector Jasbir Singh found four packets suspected to be drugs. This Yoong Thien Soong was also arrested. He was subsequently charged for a drug offence in the subordinate courts in Johore Bahru where he pleaded guilty and was sentenced to a year in jail.

The investigating officer of this case with which the first and second accused are charged is ASP Govindan (PW6). He testified that he went to the scene of the crime on the same day together with the first accused and three other police personnel which included the photographer.

Sad to say the investigation relating to the nature of the door to room B was lacking. No pictures were taken of the front side of the door nor were there detailed descriptions from PW6 of the nature of the door and the manner it could be locked from the inside and outside of the room. This leaves all parties baffled and in search of evidence as to how the door could be locked from the outside from the testimonies of other witnesses. This is an important piece of information which was relied on by both prosecution and the defence.

The exhibits suspected to be drugs were sent to the chemistry department. The chemist PW5 testified that the exhibits sent to him for analysis contain 20.28g of heroin and 3.43g of monoacetyle morphine. These two drugs are listed as dangerous drugs under the Dangerous Drugs Act 1952.

The first and second accused were also on the same day of the arrest sent to the Sultanah Aminah Hospital for urine test and no traces of drugs were found on them.

The prosecution's last witness was one Inspector Nordin Kadir who testified that he recorded a cautioned statement from the first accused. Counsel for the first and second accused objected to its admissibility. Due to this a voire dire proceeding was held and after the same was completed I ruled that the cautioned statement is inadmissible.

My reasons for its inadmissibility is based on my finding that the cautioned statement was not made voluntarily:

(1) The first accused was subjected to threats and beatings by police personnel before the cautioned statement was recorded. There was evidence that the recording officer himself had threatened the accused before recording the cautioned statement.
(2) The police had failed to observe the Lock-Up Rules and had taken the first accused outside resting hours for questioning.
(3) The cautioned statement does not contain any statement in the form and answer manner that the first accused understood the caution administered to him.
(4) There was no comma after the word 'tidak' in the caution, thereby two different meanings could be referred to in the caution.
(5) There was evidence that both the recording officer and the translator were present in the investigation of this case.

At the end of the prosecution's case, I found that the prosecution has proved a prima facie case against the first accused and the presumptions under s 37(b), (d), (da) and (g) of the Dangerous Drugs Act 1952 were invoked against him and the first accused was called upon to make his defence.

As for the second accused, I find that the prosecution has not proved a prima facie case against her. The second accused is charged together with the first accused of committing a crime with common intention under s 34 of the Penal Code (FMS Cap 6). In order for this charge against her to succeed the prosecution must prove two elements: (1) she was either committing the crime or at the scene of the crime, and (2) there must be evidence of a common intention.

As clearly stated in the celebrated case of *Mahboob Shah* v *King Emperor*,[1] there must be "a pre-arranged plan' and the crime must be 'done' in concert pursuant to the pre-arranged plan'. Justice Barakbah in *Namasiyiam & Ors* v *PP*[2] called this common intention 'a prior meetings of the minds and presupposes some prior concert'.

From the evidence before me I find that the prosecution have failed to prove this fact of common intention. There was no evidence to infer that the first accused and the second accused had a prior meeting of the minds to commit the said crime.

The second accused was in fact a girlfriend of the accused who visited the first accused occasionally. She had her own place of residence at No 7, Jalan Tombak, Taman Tebrau, Johore Bahru. This was in fact visited and confirmed by ASP Govindan.

Besides the blue skirt, there were no exhibits found in the said room B that the prosecution can prove to belong to the second accused. Inspector Jasbir Singh said he found an identity card bearing the name of the

second accused in the rotan case but, this identity card was not tendered in court. In fact the prosecution's witnesses were so embarrassed when they could not produce this identity card in court which Inspector Jasbir Singh alleged that he had found.

I also find that the second accused was not an occupier of the room B and has no care and control of the same. The presumptions of s 37(b) of the Dangerous Drugs Act 1952 cannot therefore apply to her. Neither is there any evidence to show that the second accused is/was in possession of the drugs. The second accused, from the evidence adduced to this stage, only shows that she was a girlfriend of the first accused and she happened to have spent a night with the first accused in the said room when the police raided the place.

Under such circumstances I acquitted and discharged the second accused without having to call upon her to make her defence.

The first accused after an amended charge to delete the common intention to commit the crime jointly with the second accused, pleaded not guilty to the amended charge and proceeded to give evidence on oath at the witness stand.

The first accused's defence is mainly based on the following: (a) that the drugs found in room B do not belong to him and he has no knowledge of the said drugs, (b) he was not the exclusive user of the said room since his friends frequented the place, and (c) that the door to room B was not locked at all material times and as such his friends and or any other person or persons could have access to the room and thereby could have placed the drugs there.

The accused stated that he rented room B at the same time with Yoong Thien Soong who took room A. Each were given their respective set of keys one to the grille, the other to the main door of the flat and the last one to the door of their respective rooms.

The door knob with lock to room B was already spoiled and from the photographs (exh P2) the door knob was already removed from the door when the first accused moved into room B. From the inside of room B the door was locked with a latch. From the outside, it can be locked with a padlock attached to a padlock latch. The first accused was supplied with a padlock with key to lock his door by the chief tenant. However, according to the first accused, about a few weeks after he moved into the room he lost his padlock key and had to forcefully remove the padlock to gain entry. Ever since then, he had not padlocked his room when he went out.

The first accused, according to his evidence, had a number of friends, namely, his neighbour Yoong Thien Soong (the occupant of room A), Jenny, Ah Fun, Ah Tuan and Kucing. These friends frequented his room because he had an air cooler and a mini compo player in his room. There they will chit chat or read newspapers and magazines. However, they also frequented Yoong Thien Soon's room A.

The first accused said that he worked as a partner in charge of checking stock in a hairdressing saloon called 'Smart Unisex Salon' together with a person called Ah Yap (DW2) and one other. DW2 did testify that there were occasions he saw the first accused handing over to Kenny or Yoong Thien Soong his keys to his room B when these two persons came to the hair salon to request it from the first accused.

The second accused after being acquitted and discharged by this court also testified for the defence that she knew all the above-mentioned friends of the first accused and had seen them in first accused's room, when she was taken there by the first accused.

In his submission, learned counsel for the first accused reminded this court that all the first accused has to do is to tender evidence which on the balance of probability (similar to that of a civil case) would have rebutted the prosecution's case. Bearing in mind what was submitted aforesaid, I still find that the first accused has failed to rebut the presumptions against him as laid down under s 37 of the Dangerous Drugs Act 1952.

I find that the first accused was a sub-tenant to room B of the said premises. In fact he never disputed this fact. As he had the care and management of the said room, he is presumed to be an occupier of the same under s 37(b) of the Dangerous Drugs Act 1952.

The next question one has to ask is, were the drugs concealed? I answered this in the affirmative since they were kept in a shoe box and in a rotan case. They were not displayed or placed openly in the said room. Such being the case s 37(g) of the Dangerous Drugs Act 1952 applies. Section 37(g) states that: 'if any dangerous drug is found concealed in any premises, it shall be presumed, until the contrary is proved that the said drugs is so concealed with the knowledge of the occupier of the premises.'

I find it not probable that the first accused never locked his room when he went out. The first accused was not residing in a house with his family members or persons he knew and trusted where there was no necessity to lock one's room. In fact there is no evidence that he even knew the occupants of room J which was the front room rented to three males. With a mini compo and air cooler which were valuable items I cannot accept his contention that he never locked his room door to prevent theft in the light of such circumstances.

I find it strange that the first accused said that he never padlocked the door since the day he lost his keys.

The latch for the padlock was there and according to his evidence he said a padlock could be used. He had used a padlock before and when the key was lost, he could have purchased another one. There was in fact a padlock found by Inspector Jasbir Singh in the cupboard of the room and produced in court as P28 which could be used to padlock the door.

There are also evidence to state that the grille and the main door to the premises 54-B, Jalan Perang required keys to be opened. If such places were locked, certainly it infers security was needed.

I also find that the said door to room B was locked from the evidence of Ah Yap (DW2) when he said that Kenny and Yoong Thien Soong occasionally came to the saloon to take the keys to open first accused's room. Since Yoong Thien Soong was also a resident in 54-B, Jalan Perang why did he need to collect keys from first accused? He would have his own keys to gain entry to premises 54-B, Jalan Perang. This infers that he needed the key to open the first accused's room B.

Learned counsel for the first accused quoted to me the decision of Mr Justice Shankar in the case of *PP* v *Aris bin Yunos*[3] and my decision in *PP* v *Chong Wei Kian*[4] where decisions were made relating to the 'exclusive right' to the use of the premises or room. I like to stress that 'exclusive right' must be viewed in the light of all circumstances of each particular case. It does not mean that once the accused person tendered evidence that some of his friends entered the room with or without his permission it is sufficient evidence to say that the drugs found therein did not belong to the accused and that he has lost his exclusive use of the room. All the facts of each case must be viewed separately to determine the element of exclusive right.

In this case I find that the first accused had still the care and custody of the things in his said room when the place was raided by the police. There was no evidence by the first accused that his friends were in his rooms the night before or the days before nor was there any evidence by him that his friends took his keys just before the police raid. If the first accused had lost the exclusive right to the room, it was only for a temporary nature and he has regained it when he returned. He was there in the room with his girlfriend for the whole night and he would have been aware of what was contained therein especially in a room which furniture consist of only the plastic cupboard, the mattress, the mini compo, the air cooler and the shoe boxes.

The first accused admitted that the two shoe boxes belong to him and he could have disposed of the same. I find it unacceptable when the first accused stated that he was not aware of the contents therein. He had ample opportunity to look into it and was not curious according to him to do so. The presence of these shoe boxes were evidently meant for some specific purposes as no other containers or pieces of like furniture for storage were found in the room. As they were meant for specific purposes and not thrown away, the accused should be concerned of what was contained therein. When the room is small, there would be more occasions for the first accused to look into it most of the time.

Under all the circumstances as stated above, I find that the first accused has not rebutted the various presumptions stated earlier under the Dangerous Drugs Act 1952 and neither has he rebutted the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 when the drug so found exceeds 15g in weight.

I therefore find the first accused guilty of the amended charged.

First accused convicted. Second accused acquitted.

Solicitors: *Abdul Rahman Saad & Associates.*

Reported by *Zarinah Marican*

Kesatuan Pekerja-Pekerja Perusahaan Logam v KL George Kent (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-32-128-88
EUSOFF CHIN J
29 AUGUST 1989

Labour Law — Collective agreement — Allegation of failure to comply with collective agreement — Industrial Court failed to consider relevant provisions of collective agreement and subsidiary legislation — Whether this amounts to jurisdictional error — Application to quash decision of Industrial Court — Code of Conduct for Industrial Harmony 1975, cll 20, 21, 22(a)(ii), 22(b)(ii), (iv), (v) & 23

Administrative Law — Certiorari — Application to quash decision of Industrial Court — Whether Industrial Court had failed to consider relevant provisions of collective agreement and Code of Conduct for Industrial Harmony — Error in jurisdiction

Five employees of the respondents were retrenched from their jobs as supervisors and postal despatch clerks, after which the respondents continued to recruit workers for the posts of operators. It was argued before the Industrial Court that under the collective agreement by which all parties were bound and under the Code of Conduct for Industrial Harmony, the respondents should have offered the posts of operators to the five retrenched employees. The Industrial Court held that the respondents were not obliged to offer the operators' posts to the five employees because the employees had not applied to the post, and because the respondents had intended to abolish the retrenched employees' jobs. The applicant then applied to quash this decision.

Held, allowing the application and directing that it should determine the dispute afresh:

(1) It appears that the Industrial Court had not considered the provisions of art 10.1 of the collective agreement